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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

**MARION B. FOLSOM, (now FLEMING),
SECRETARY OF HEALTH, EDUCATION
AND WELFARE,**

Petitioner,

vs.

FLORIDA CITRUS EXCHANGE, et al

and

FRANK R. SCHELL,

Respondents

**BRIEF OF STATE OF FLORIDA
AS AMICUS CURIAE**

RICHARD W. ERVIN

Attorney General

State of Florida

Tallahassee, Florida

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Comes now the State of Florida by its appropriate legal representative, the Attorney General, and files this brief as Amicus Curiae, and if leave is required respectfully requests the Court to grant leave to file this brief.

INTEREST OF STATE OF FLORIDA

The production of oranges and citrus fruit is one of the largest industries in the State of Florida, employing large numbers of people and requiring large investments of capital, and large sums of money are invested in the packing houses and coloring rooms and equipment used in the coloring of mature oranges otherwise meeting the standards for grade and pack provided by law. At the time of the hearing

which subsequently resulted in taking FD&C Red No. 32 off the list of certified colors, neither the Florida Citrus Commission nor the Industry itself thought that FD&C Red No. 32 as used in the coloring of oranges was under attack. It had been in use prior to the passage of the Food, Drug and Cosmetic Act of 1938 and had been certified after extensive hearings and had been extensively used without any complaint for around twenty years. It is the only color now used for the coloring of oranges and it is now being used for that purpose only.

The notice of the hearings which resulted in taking FD&C Red 32 off the list of certified colors was inadequate to apprise the Citrus Industry that there was any contemplation of denying its use in the coloring of oranges and there was not sufficient time for the preparation of any defense. The denial of the use of this color at this time would result in great loss to the growers of citrus fruit in Florida and make it difficult, and in some instances impossible, to market fruit which is fully mature and good. The coloring of oranges is an economic necessity and is necessary in the production of fruit for marketing.

ARGUMENT

The State feels that the general factual situation and the law have been covered in the briefs of the Respondents and adopts the arguments set forth in the Brief of Florida Citrus Exchange. The State urges that the construction of the word "harmless" should be construed in a reasonable manner, taking into consideration the uses and quantities of the color used in the coloring of oranges. This construction was properly upheld in the Court of Appeals for the Fifth Circuit. Under the present construction placed

upon the word "harmless" by the Secretary of Health, Education and Welfare it will be impossible to certify any coal-tar color.

Carrying our part of the spirit of Public Law No. 672, 84th Congress, 2d Sess (H.R. 7732), research has been continued and a color developed with 50 times the no-effect level of FD&C Red 32 which in effect provides a color that the amount likely to be ingested is so infinitesimal that a human being would feel the effects of too much liquid and suffer from the overindulgence of pure juice or an equal amount of pure water before getting enough color to cause injury; in other words man doesn't have the capacity to drink enough juice to ingest enough color to harm him. This new color cannot be certified under the present construction of the Secretary. Certainly we feel that neither the Congress nor the Court intended such construction of the word "harmless" and we respectfully ask this Honorable Court for a construction of the word "harmless" in such a manner that any new coal-tar color which causes no harm except at extremely high levels can be certified.

In view of the reference to the Citrus Commission in Petitioner's Brief, appearing on page 7 of the Petitioner's Brief, we felt that we should appear and, under the provisions of Paragraph 4, Rule 42 of the Rules of the Supreme Court of the United States, we thought it proper for the State of Florida to appear as the Florida Citrus Commission is a State Agency and this brief, as friend of the Court, is on behalf of this agency and the State.

It was not intended that anything that was said by the Florida Citrus Commission should be intended to acquiesce

in or consent to the taking of FD&C Red 32 off the approved list, until another color could be certified which could be used in the coloring of oranges.

To show the importance of the use of color in the State of Florida we include herewith excerpts from the Report of the Florida Citrus Inspection Bureau showing the percentage of color-added oranges since the 1938-1939 season:

Table #1

Season	Oranges Total Shipped	Oranges Total Colored	Percent Colored
1938-39	27,726,963	14,951,080	53.9
1939-40	18,954,443	6,672,269	35.2
1940-41	22,904,429	7,770,624	35.9
1941-42	21,183,713	8,442,970	38.9
1942-43	28,452,013	11,073,757	38.9
1943-44	32,752,390	18,735,188	57.2
1944-45	26,013,918	16,341,691	62.8
1945-46	27,836,857	21,249,972	76.3
1946-47	30,061,266	21,731,995	72.3
1947-48	25,146,951	17,101,488	68.0
1948-49	28,302,233	20,576,590	72.7
1949-50	20,449,442	14,497,245	70.9
1950-51	21,474,494	14,901,864	69.4
1951-52	26,979,133	17,542,648	65.0
1952-53	22,224,392	12,753,552	61.9
1953-54	24,115,727	15,693,140	65.1
1954-55	22,574,267	13,537,175	60.0
1955-56	20,946,070	13,806,103	64.3
1956-57	19,305,133	12,235,129	63.4

The coloring of oranges is not used to conceal inferiority or for deception. The State of Florida and the Citrus Com-

mission have fought for high standards. As pointed out in the Florida Citrus Exchange brief a higher standard of maturity is required before a fruit can be colored than is required on other shipments. The Florida Citrus Code (Section 601) specifically prohibits the use of color for the purpose of deceit. Let us emphasize, the State and the Florida Citrus Commission have worked hard to insure that the public get a good product. Neither would approve or advocate anything to allow an inferior product on the market or to deceive or cover up inferiority.

CONCLUSION

We respectfully submit that this Honorable Court should affirm the decision of the Court of Appeals for the Fifth Circuit and that the matter be so clarified that the Secretary will know that he has the authority to certify coal-tar colors as harmless when in the manner and quantity as used they are harmless.

Respectfully submitted,

STATE OF FLORIDA

By _____
RICHARD W. ERVIN
Attorney General
Tallahassee, Florida

PROOF OF SERVICE

I, Richard W. Ervin, Attorney General of Florida, hereby certify that on the day of, 1958, I mailed Air Mail, postage prepaid, five copies of the attached brief to:

HONORABLE J. LEE RANKIN

Solicitor General
Department of Justice
Washington 25, D. C.

HONORABLE WILLIAM W. GOODRICH

Department of Health, Education and Welfare
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and by regular mail, postage prepaid, five copies of the attached brief to:

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